

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs February 11, 2009

DWANE WASHINGTON v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 2005-C-2071 Cheryl Blackburn, Judge

No. M2008-01062-CCA-R3-PC - Filed June 16, 2009

The Petitioner, Dwane Washington, appeals as of right the Davidson County Criminal Court's denial of his petition for post-conviction relief. The Petitioner alleges that his guilty plea to possession of 0.5 grams or more of cocaine with the intent to sell, a Class B felony, was not voluntarily, knowingly and understandingly made due to the ineffective assistance of counsel. His main contention is that trial counsel advised him he was eligible for participation in the Department of Correction's (DOC) Boot Camp Program, which advice later proved to be incorrect, and that, but for this advice, he would not have pleaded guilty. After the appointment of counsel and a full evidentiary hearing, the post-conviction court found that the Petitioner failed to prove his allegations by clear and convincing evidence and denied the petition. Following our review, we conclude that trial counsel rendered deficient performance when she incorrectly advised the Petitioner that he was eligible for the boot camp program. We reverse the judgment of the post-conviction court and remand for a determination regarding whether that deficiency was prejudicial to the Petitioner.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed;
Remanded**

DAVID H. WELLES, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

Jeremy W. Parham, Nashville, Tennessee, for the appellant, Dwane Washington.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Bret Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

The Petitioner was originally indicted, in Case No. 2005-C-1929, for possession of 0.5 grams or more of cocaine with the intent to sell, a Class B felony; tampering with evidence, a Class C felony; simple possession of marijuana, a Class A misdemeanor; and unlawful use of drug paraphernalia, a Class A misdemeanor. See Tenn. Code Ann. §§ 39-16-503, -17-417, -17-418, -17-425. In Case No. 2005-C-2071, the Petitioner was charged with possession of 0.5 grams or more of cocaine with the intent to sell and simple possession of marijuana.

Pursuant to the terms of his plea agreement, in exchange for his guilty plea to B felony cocaine possession in Case No. 2005-C-2071, the remaining charges in both cases were to be dismissed. Furthermore, the petition to enter his plea requests the trial court to impose the following sentence: “12 years @ 35% to serve—recommendation for TDOC Boot Camp Program; \$2,000 mandatory min[imum] fine; concurrent with 2004-C-1904.”

At the June 2, 2006 guilty plea hearing, the State provided the facts supporting the Petitioner’s plea:

[T]he State’s proof would be on May 24th of 2005 officers of the Metropolitan Police Department were working with a confidential informant to arrange for the delivery of \$40 of crack cocaine. The confidential informant called [the Petitioner] and set up a deal to meet at Super 8 Motel on Harding Place. And then [the Petitioner] called the confidential informant back and asked her to drive him somewhere. When the confidential informant got in the car with [the Petitioner], she gave the arrest signal. [The Petitioner] was arrested with approximately four grams of cocaine on his person and \$291.

During the hearing, the trial court spoke with the Petitioner regarding his participation in the boot camp program. The trial court inquired as follows:

THE COURT: I’ll recommend boot camp, but I want to make sure you understand that it is totally up to the Department of Correction[] about whether or not you meet their guidelines; okay? And since you have this other conviction, I don’t know that that will be a problem. But it will be up to them. Do you understand that?

[THE PETITIONER]: Yes, ma’am.

THE COURT: Okay. Now, have you applied to go to the boot camp program on your other case?

[THE PETITIONER]: The only reason why I couldn’t go to boot camp is because I had a detainer. They told me once I got the detainer taken [sic] care of and I got a recommendation from the judge—

THE COURT: Okay. So you've already inquired about that. Well, this should—and I'll give you a copy of your judgment form today so that you can take it with you. But the detainer should be taken off of your case; okay?

At the conclusion of the hearing, the trial court imposed the agreed upon sentence: a twelve-year sentence as a Range II, multiple offender, to be served concurrently with a prior eight-year sentence, as well as a recommendation that the Petitioner be allowed to attend boot camp. The judgment forms also indicate a "boot camp recommendation" as a special condition of the Petitioner's plea.

The Petitioner filed a petition for post-conviction relief on December 29, 2006. Counsel was appointed for the Petitioner, and an amended petition was filed. In his amended petition, the Petitioner asserted that his trial counsel was ineffective due to her failure to accurately determine the Petitioner's eligibility for the boot camp program and her failure to adequately communicate with the Petitioner.¹ A hearing was held on December 12, 2007, at which the Petitioner and trial counsel were the only witnesses.

The Petitioner testified that, on the Friday before his trial was to begin, he requested trial counsel negotiate a plea agreement with the State, seeking a twelve-year sentence for the present offenses, to be served concurrently with his prior eight-year sentence, and a recommendation for placement in the boot camp program. Trial counsel was able to negotiate such a deal and told the Petitioner that he was eligible for boot camp with a twelve-year sentence as a Range II, multiple offender. According to the Petitioner, the district attorney also confirmed that he was eligible for participation in the boot camp program. Based upon this information, he agreed to plead guilty.

The Petitioner stated that the Friday before trial was the first time he had a conversation with trial counsel about his eligibility for the DOC Boot Camp Program. Also, the Petitioner entered into evidence a note written by trial counsel to the Petitioner, showing that trial counsel had conversed with Jim Brown at the Department of Correction, that Mr. Brown advised that the Petitioner was boot camp eligible on his sentence of twelve years for cocaine possession under twenty-six grams, and that the Petitioner was subject to DOC screening. Based upon trial counsel's statements, the Petitioner understood that it was ultimately up to the DOC whether he would be placed in boot camp and that he would still be subject to screening by the DOC; however, he believed he was at least eligible for participation in the program. When asked what would happen to his plea deal if he was found to be ineligible for boot camp, the Petitioner responded that trial counsel told him he could file a petition for post-conviction relief based upon ineffective assistance of counsel and withdraw his guilty plea.

¹ The Petitioner also submitted that trial counsel failed to properly question the arresting officer at the suppression hearing. However, the Petitioner has abandoned this ground on appeal and, thus, the issue is waived. Moreover, the post-conviction court noted that trial counsel questioned the officer about contradictions in his testimony at the suppression hearing and statements he made at the preliminary hearing. Trial counsel also obtained transcripts from these two hearings, which she planned to use to cross-examine the officer at trial.

After entering his plea in June and returning to Northwest Correctional Complex, the Petitioner was informed by the DOC that he would be sent to boot camp after complying with several requirements. In October, the Petitioner was advised that he was going to boot camp and that there was a space on the bus for him. Later that evening, he was advised by the DOC that a mistake had been made and that he was ineligible for boot camp because he was sentenced as a Range II, multiple offender. See Tenn. Code Ann. § 40-20-207 (only especially mitigated and standard drug offenders qualify for the boot camp program). The Petitioner stated that, had he known he was ineligible for boot camp, he would not have pleaded guilty.

After the DOC informed the Petitioner he was ineligible, the Petitioner telephoned trial counsel. According to the Petitioner, trial counsel informed that there was not much she could do but that the Petitioner could file a petition for post-conviction relief alleging ineffective assistance of counsel.

Regarding communications with trial counsel, the Petitioner stated that his case was pending for approximately one year before he pleaded guilty and that trial counsel met with him only once during this time. He confirmed that he received a copy of the discovery and that trial counsel reviewed this material with him. However, he averred that trial counsel did not follow through with investigating matters he had requested.

On cross-examination, the Petitioner confirmed that he was on probation for eight years at the time he was charged with these offenses. He also acknowledged that he was indicted for two B felonies, which both carried a sentence of twelve to twenty years. The Petitioner was on bond in Case No. 2005-C-1929 at the time he committed the offenses in Case No. 2005-C-2071, and he understood that consecutive sentencing would be mandatory if he were convicted of both offenses. Moreover, he understood that the trial court could consider that he was on probation in another case as a factor in its consecutive sentencing determination. The Petitioner agreed that his minimum exposure, if convicted on the “top counts,” was twenty-four years at 35% and potentially up to forty-eight years in the DOC.

When asked if had any other complaints about trial counsel’s representation, the Petitioner reiterated that trial counsel failed to investigate the issues and that he only met with trial counsel once. Additionally, he testified that the only discussions between himself and trial counsel concerned plea negotiations. The Petitioner acknowledged that, at the guilty plea hearing, he was asked if he had been satisfied with the work trial counsel had done on his case, and he replied, “I have been that.”

Trial counsel testified and confirmed that she advised the Petitioner that he was eligible for boot camp. She further affirmed that her advice ultimately proved to be incorrect, as the Petitioner was later deemed ineligible for the program due to his status as a Range II offender.

Trial counsel confirmed that placement in the boot camp program was important to the Petitioner “from the very beginning.” She stated that they had “several talks” about the issue of boot

camp and that the first entry in her notes about such a discussion was on February 24, 2006. When asked why she did not contact the DOC earlier about the Petitioner's eligibility, she stated that there was no "firm" plea offer until June 2. Trial counsel testified that she was familiar with the boot camp statute and that she had previously participated in pleas involving boot camp recommendations.

Following successful plea negotiations with the State on the Friday before the Petitioner's trial, trial counsel conferred with other public defenders about whether the Petitioner was eligible under the terms of the plea agreement, but they were "not sure." Trial counsel used the court officer's telephone and, as she had done on prior occasions, contacted the DOC, requesting to speak with someone in classification to discuss eligibility requirements. After being transferred several times, she was informed by a DOC employee that the Petitioner was eligible for boot camp. She could not recall the names of whom she spoke with at the DOC. When asked what she told the Petitioner would happen if he entered his plea and was later unable to attend boot camp, trial counsel replied that she informed the Petitioner to contact her quickly in such a case and, if he was still unsatisfied, then he could seek post-conviction relief.

According to trial counsel, when the DOC told the Petitioner he was ineligible for boot camp, he contacted her. Trial counsel also received an email correspondence from the DOC, stating that, although the Petitioner was originally thought to be eligible for the program, he was not, and that the previous information was in error because the Petitioner was sentenced as a multiple offender. After this email, trial counsel drafted a letter to the Petitioner memorializing this information. In this letter, she encouraged the Petitioner to file a petition for post-conviction relief as "[t]hat might be [his] best bet for getting back into court on [the] case."

Trial counsel testified that she knew the Petitioner wanted boot camp "for a long time," that it was "very important to him," and that she had assured him he was eligible for boot camp. She also stated that she discussed eligibility requirements for boot camp versus the DOC screening process with the Petitioner: "[W]e talked about how even when I told him he was eligible for boot camp it was up to [the DOC] whether he would get to go or not."

On cross-examination by the State, trial counsel was asked how often she met with the Petitioner. She stated that she did not meet with him often because he was transferred to Northwest Correctional Complex in September, so it was difficult to meet with him in person. Trial counsel testified that she discussed with the Petitioner trying to get him transferred back to Nashville in order for them to meet. She believed he was transferred prior to trial and that they were able to do some trial preparation. On the day of the plea, the Petitioner did not relay any complaints to trial counsel about her not visiting him enough. Trial counsel testified that she relied on the assurance from the DOC in advising the Petitioner he was eligible for participation in the boot camp program.

After hearing the evidence presented, the post-conviction court entered an order denying the petition on March 25, 2008. The post-conviction court ruled that the Petitioner had not satisfied his

burden to demonstrate that trial counsel was ineffective for her reliance on DOC's initial representation of his boot camp eligibility, reasoning as follows:

While unfortunate that [the]DOC misadvised trial counsel as to [the] Petitioner's [b]oot [c]amp eligibility, the [c]ourt finds that counsel's reliance on [the]]DOC's representation does not render counsel ineffective. During [the] Petitioner's first three months serving his sentence in this case, [the]DOC gave [the] Petitioner the impression that he was in fact eligible for the program. [The]DOC even had [the] Petitioner prepared to leave on the bus for the program and only shortly before departure did [the]]DOC inform [the] Petitioner that he was not eligible. The error in this case lies with [the]]DOC, not with trial counsel.

This [c]ourt is not bestowed with the authority to order that the DOC accept particular defendants into its [b]oot [c]amp program; rather, this [c]ourt may only make recommendations that certain defendants are considered for said program. During [the] Petitioner's June 2, 2006 plea hearing, the [c]ourt informed [the] Petitioner that [the]DOC would determine whether he was eligible to participate in [b]oot [c]amp, which [the] Petitioner indicated that he understood.

The post-conviction further determined that the Petitioner's claim that trial counsel did not adequately communicate with him was waived because the Petitioner presented no proof on this issue. The post-conviction court went on to note trial counsel's efforts in trying to have the Petitioner transferred back to Nashville, so that they could work together on trial preparation, and that trial counsel testified the Petitioner did not register any complaints about her not meeting with him enough. This appeal followed.

ANALYSIS

On appeal, the Petitioner argues that the post-conviction court erred in denying him relief because: (1) Trial counsel was ineffective due to her mistaken advice that he was eligible for placement in the boot camp program; and (2) Trial counsel failed to adequately communicate with him. To sustain a petition for post-conviction relief, a petitioner must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. See Tenn. Code Ann. § 40-30-110(f); Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). Upon review, this Court will not reweigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the post-conviction judge, not the appellate courts. See Momon, 18 S.W.3d at 156; Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). The post-conviction judge's findings of fact on a petition for post-conviction relief are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against those findings. See Momon, 18 S.W.3d at 156; Henley, 960 S.W.2d at 578.

The Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. State

v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to “reasonably effective” assistance, that is, within the range of competence demanded of attorneys in criminal cases. Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer’s assistance to his or her client is ineffective if the lawyer’s conduct “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the defendant’s lawyer and actual prejudice to the defense caused by the deficient performance. Id. at 687; Burns, 6 S.W.3d at 461. The defendant bears the burden of establishing both of these components by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The defendant’s failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

This two-part standard of measuring ineffective assistance of counsel also applies to claims arising out of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58 (1985). The prejudice component is modified such that the defendant “must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” Id. at 59; see also Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

In evaluating a lawyer’s performance, the reviewing court uses an objective standard of “reasonableness.” Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel’s choices “and should indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel’s tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel’s alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court’s determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court’s findings of fact with regard to the effectiveness of counsel under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. Id. “However, a trial court’s conclusions of law—such as whether counsel’s performance was deficient or whether that deficiency was prejudicial—are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court’s conclusions.” Id. (emphasis in original).

Once a guilty plea has been entered, effectiveness of counsel is relevant only to the extent that it affects the voluntariness of the plea. In this respect, such claims of ineffective assistance

necessarily implicate the principle that guilty pleas be voluntarily and intelligently made. Hill v. Lockhart, 474 U.S. at 56 (citing North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 164 (1970)).

When a guilty plea is entered, a defendant waives certain constitutional rights, including the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront witnesses. Boykin v. Alabama, 395 U.S. 238, 243 (1969). “A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.” Id. at 242. Thus, in order to pass constitutional muster, a guilty plea must be voluntarily, understandingly, and intelligently entered. See id. at 243 n.5; Brady v. United States, 397 U.S. 742, 747 n.4 (1970). To ensure that a guilty plea is so entered, a trial court must “canvass[] the matter with the accused to make sure he [or she] has a full understanding of what the plea connotes and of its consequence[s].” Boykin, 395 U.S. at 244. The waiver of constitutional rights will not be presumed from a silent record. Id. at 243.

In State v. Mackey, 553 S.W.2d 337 (Tenn. 1977), the Tennessee Supreme Court set forth the procedure for trial courts to follow in Tennessee when accepting guilty pleas. Id. at 341. Prior to accepting a guilty plea, the trial court must address the defendant personally in open court, inform the defendant of the consequences of a guilty plea, and determine whether the defendant understands those consequences. See id.; Tenn. R. Crim. P. 11. A verbatim record of the guilty plea proceedings must be made and must include, without limitation, “(a) the court’s advice to the defendant, (b) the inquiry into the voluntariness of the plea including any plea agreement and into the defendant’s understanding of the consequences of his entering a plea of guilty, and (c) the inquiry into the accuracy of a guilty plea.” Mackey, 553 S.W.2d at 341.

Here, the Petitioner claims that he would not have pleaded guilty if had been accurately apprised that he was not eligible for participation in the boot camp program. Trial counsel testified that she contacted the DOC and asked to speak with someone in classification. She then relayed the terms of the plea agreement to the employee and was informed that the Petitioner was eligible for placement in the program. She relied on this assurance from the DOC employee in advising the Petitioner that he was eligible for boot camp. The trial court did recommend the Petitioner for the program. For the first several months of his incarceration, the DOC prepared the Petitioner for placement in the boot camp program. The Petitioner was ready to leave on a bus for boot camp when the DOC informed him that he was ineligible. Apparently all parties believed that boot camp was available to the Petitioner until this time.

While the post-conviction court correctly noted that the DOC employee erred by informing trial counsel that the Petitioner was eligible for the program, we must also conclude that trial counsel was ineffective for relying on this information. The statute regarding boot camp eligibility requirements for drug offenders is clear:

Notwithstanding the six (6) year or less sentence limitation of this part, an especially mitigated offender, as defined by § 40-35-109, or a standard offender, as

defined by § 40-35-105, who is convicted of a violation of § 39-17-417(a) with respect to a controlled substance in an amount less than that set out in § 39-17-417(i), is eligible for placement in the special alternative incarceration unit as defined and authorized by this part.

Tenn. Code Ann. § 40-20-207. The Petitioner, as a Range II, multiple offender, did not qualify. Trial counsel's advice was directly contrary to the statute.

However, in order to obtain relief, the Petitioner must also prove that he was prejudiced by the deficient performance. See Strickland, 466 U.S. at 687. We are unable to determine from the record whether the deficiency was prejudicial to the Petitioner. Both the Petitioner and trial counsel testified that the Petitioner understood that his placement in the boot camp program was not guaranteed. Moreover, at the guilty plea hearing, the trial court spoke with the Petitioner about his sentence and made sure that he knew the final decision was vested with the DOC. The Petitioner apparently accepted that he would have no recourse if the DOC decided not to place him in boot camp.

If convicted of the "top counts," the Petitioner faced a minimum sentence of twenty-four years and potentially up to forty-eight years. He acknowledged that he committed the offenses in Case No. 2005-C-2071 while on bond in Case No. 2005-C-1929, requiring mandatory consecutive sentences. The Petitioner also confirmed that he was serving an eight-year sentence on probation at the time he committed these offenses.

Nonetheless, trial counsel confirmed that the boot camp was important to the Petitioner from the beginning. The Petitioner also testified that trial counsel told him he could seek post-conviction relief and withdrawal his plea if he was later determined to be ineligible for boot camp. In fact, trial counsel later wrote a letter encouraging the Petitioner to file a petition for post-conviction relief. At the post-conviction hearing, the Petitioner was directly asked, "[I]f you had known you were not eligible for boot camp, would you have entered the plea in this case?" The Petitioner replied, "No sir. I would have went on and took it to trial." The Petitioner contradicted this somewhat later, testifying as follows:

I just feel like, you know, I deserve a chance, you know, to at least attend this program. . . . That's all I want, Your Honor. I don't even—I don't really care—I wouldn't want to take it to trial. I'll take it to trial, you know, if I can't withdraw my guilty plea. If I can withdraw my guilty plea, I'll withdraw my guilty plea. But I would rather just have thirty-five percent modified to thirty percent where I can go to this program and try and get out. That's what I would like.

The post-conviction court did not make any credibility determinations in its findings, specifically with regard to whether the Petitioner, given the amount of time he was ultimately facing if he proceeded to trial, would have proceeded to trial if he was correctly informed that he was not eligible for boot camp. We must remand for further findings.

Briefly, we note that the Petitioner also alleged that trial counsel did not adequately communicate with him. The Petitioner testified that he received a copy of the discovery in this case. Trial counsel successfully had the Petitioner transferred to Nashville for trial preparation. Trial counsel secured the plea agreement that the Petitioner desired. Additionally, trial counsel testified that the Petitioner never lodged any complaints about her not meeting with him often enough. The evidence does not preponderate against the finding of the post-conviction court that trial counsel adequately communicated with the Petitioner.

CONCLUSION

Based upon the foregoing, we conclude that the post-conviction court erred by determining that Petitioner received the effective assistance of counsel. After a review of the record, we conclude that trial counsel's incorrect advice that the Petitioner was eligible for the participation in the boot camp program amounted to deficient performance. Accordingly, the judgment of the Davidson County Criminal Court is reversed. Upon remand, the post-conviction court shall determine whether this deficiency was prejudicial to the Petitioner.

DAVID H. WELLES, JUDGE